



POLICE DEPARTMENT CITY OF NEW YORK

February 10, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Brett Healy
Tax Registry No. 945809
76 Precinct
Disciplinary Case No. 2014-12333

Sergeant James Wilson
Tax Registry No. 942713
120 Precinct
Disciplinary Case No. 2014-12334

Lieutenant Paul McKenna
Tax Registry No. 935284
Technical Assist. & Response Unit
Disciplinary Case No. 2014-12332

Charges and Specifications:

Disciplinary Case No. 2014-12333

1. Said Police Officer Brett Healy, on or about May 11, 2013, at approximately 1730 hours, while assigned to the 76th Precinct and on duty, [REDACTED], did intentionally use force without police necessity in that he shoved Person A in the chest and caused physical injury.
P.G. 203-11 - USE OF FORCE

Disciplinary Case No. 2014-12334

1. Said Sergeant James Wilson, on or about May 11, 2013, at approximately 2120 hours, while assigned to the 76th Precinct and on duty, [REDACTED], engaged in conduct prejudicial to the good order, efficiency, and discipline of the New York City Police Department in that he searched said location, without sufficient legal authority.
P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

Disciplinary Case No. 2014-12332

1. Said Lieutenant Paul McKenna, on or about May 11, 2013, at approximately 1730 hours, while assigned to the 76th Precinct and on duty, [REDACTED], engaged in conduct prejudicial to the good order, efficiency, and discipline of the New York City Police Department, in that he entered said location without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

2. Said Lieutenant Paul McKenna, on or about May 11, 2013, at approximately 2120 hours, while assigned to the 76th Precinct and on duty, [REDACTED], engaged in conduct prejudicial to the good order, efficiency, and discipline of the New York City Police Department, in that he entered said location without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

Appearances:

For CCRB-APU: Andre Applewhite, Esq.
For Respondents: John Tynan, Esq. for Respondent Healy
Matthew Schieffer, Esq. for Respondent Wilson
Michael LaCondi, Esq. for Respondent McKenna

Hearing Date:

December 11, 2015

Decision:

Respondent McKenna: Specifications 1 and 2: Not Guilty
Respondent Healy: Specification 1: Not Guilty
Respondent Wilson: Specification 1: Not Guilty

Trial Commissioner:

ADCT Jeff S. Adler

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on December 11, 2015. Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. Respondents testified on their own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent McKenna not guilty of both charges of unlawful entry, Respondent Healy not guilty of excessive force, and Respondent Wilson not guilty of an unlawful search.

FINDING AND ANALYSIS

At about 1700 hours on May 11, 2013, Respondent James Wilson, now a sergeant but an officer at the time, responded to a 10-85 call for assistance involving a large disorderly group [REDACTED]. Upon arrival, he came to the aid of three officers involved in an altercation with civilians. A crowd gathered, and some people were actively trying to aid the civilians against the police. Soon after helping "push the crowd back", Respondent Wilson noticed that his shield was missing; he suspected it was taken during a struggle with a male he later learned to be Person B, who had placed his hands on the officer's chest during the altercation. Respondent Wilson promptly informed Respondent Paul McKenna, a lieutenant, that his shield was missing; McKenna, along with his operator, Respondent Brett Healy, had arrived at the location in response to the 10-85 as well.

Recognizing the serious implications of a missing shield, Respondent McKenna immediately began efforts to try to retrieve it. After briefly searching outside the building for the missing shield, all three Respondents, along with other members of the service, went inside [REDACTED] to try to locate the shield. Respondent Wilson saw Person B go into that building, and an anonymous source had indicated to police that the man who took the shield had gone inside that building as well. The officers did a

“vertical” inside the building, knocking on doors starting on the 6th floor and working their way down. One of the doors they knocked on was for Apartment [REDACTED], which was answered by Person A. At issue is whether the record established that Respondent McKenna led his officers inside that apartment without legal authority, and whether Respondent Healy shoved Person A in the chest, causing physical injury, as a means of entering the apartment. I find that it has not.

After failing to find the shield [REDACTED], Respondents returned to the precinct for a follow-up investigation. Respondent McKenna did a computer check for photographs of residents of that building, and Respondent Wilson identified the photograph of Person B as the male who he was convinced took his shield. At about 2120 hours, the three Respondents, along with two detectives and multiple additional officers, returned to Apartment [REDACTED], Person B's address. The detectives took the lead in knocking on the door and speaking with an occupant. Respondents again entered the apartment, and soon after, Respondent Wilson announced that he recovered his shield from a shelf in one of the bedrooms. At issue is whether the record established that Respondent McKenna led his men inside the apartment for a second time without legal authority, and whether Respondent Wilson searched inside the apartment without legal authority. I find that it has not.

The four civilian witnesses, who are part of a civil lawsuit against the Police Department that is pending in federal court, did not appear to testify at this trial. Instead, CCRB introduced into evidence the recorded statements, and accompanying transcripts, for each of the following: Person A (CCRB Exs. 1 and 1A), Person B (CCRB Exs. 2 and 2A), Person C (CCRB Exs. 3 and 3A), and Person D

(CCRB Exs. 4 and 4A). Hearsay evidence is admissible in an administrative tribunal, and a case may be proven with such evidence provided it is found to be sufficiently reliable and probative on the issues to be determined. See *Ayala v. Ward*, 170 A.D.2d 235 (1st Dept. 1991); *In the Matter of 125 Bar Corp v. State Liquor Authority of the State of New York*, 24 N.Y.2d 174 (1969). To be sure, it is preferable to have testimony from a live witness, where opposing counsel has the opportunity to cross-examine, and the court can observe the demeanor of the witness. But in the absence of such live testimony here, this tribunal listened carefully to the prior recorded statements of the civilian witnesses and reviewed the transcripts.

In their CCRB interviews, each of the four civilian witnesses stated that before the first incident in the apartment, there was an altercation outside the building, which started with an argument involving one man and two women. Police arrived, and a struggle between the police, the man, and the two women ensued. According to Person A, she and Person D were returning from a store as the altercation was happening; Person A acknowledged that she is “nosy” and got close enough to the melee that she was concerned she might get knocked down by police. (CCRB Ex. 1 A, p. 17) At about the 15:14 mark of her recorded statement (page 16 transcript), Person A began to suggest that she confronted the officers involved in the struggle, stating “I was like, what you all?”, before she abruptly stopped mid-sentence and stated that her boyfriend (Person B) was looking at her like she should mind her own business.

Person B and Person A’s son, Person C, each stated that they came downstairs when they noticed the commotion out front from their apartment window. Person B denied

getting involved in the altercation, claiming that he merely watched from the front of the building. Person B denied taking the shield from Wilson. (CCRB Ex. 2A, p. 17)

According to the four witnesses, they went upstairs to Apartment [REDACTED]. About 15 minutes later, police came knocking on the door, which Person A answered. All four witnesses claimed that police, including each of the Respondents, forced their way into the apartment without consent. More specifically, Person A stated that Respondent McKenna initially told her that the police wanted to make sure everyone inside was okay. When Person A refused the police entry without a warrant, Respondent Healy pushed her out of the way, causing her to collide with her freezer. At one point, Person A described Respondent Healy's actions as a two-handed push in the chest (CCRB Ex. 1 A, pp. 25-26), while at another point she embellished further, stating that Respondent Healy "tackled me down like a football player." (CCRB Ex. 1A, p. 23) Person A initially stated that she struggled to "get up off the floor," (CCRB Ex. 1A, p. 7), though later in her statement she claimed that she "didn't fall all the way down to the ground." (CCRB Ex. 1A, p. 26)

The other three civilians offered out-of-court accounts of the alleged push that varied and were not particularly persuasive. Person D couldn't identify who pushed Person A, stating only that he saw someone place their hands on "her side and back" (CCRB Ex. 4A, p. 19). In contrast, Person C claimed the push was "in the chest area." (CCRB Ex. 3A, p. 25) Person B, meanwhile, acknowledged that he didn't really see her get pushed; it all happened so fast that he "just seen her go to the side." (CCRB Ex. 2, 30:23; CCRB Ex. 2A, pp. 34-35.) These inconsistencies might have been explored more thoroughly

with the benefit of live testimony. As the record stands, this tribunal is not persuaded as to the accuracy of these hearsay accounts.¹

In support of Person A's claim that she was pushed, CCRB offered into evidence her medical records from SUNY Downstate Medical Center. (CCRB Ex. 5) Person A, [REDACTED], went to the hospital immediately after the initial entry into the apartment. According to the records, she complained that she "was pushed against (a) wall by police." Person A was diagnosed with a shoulder and neck strain, told to take Tylenol [REDACTED] and discharged about two hours after her arrival. If Person A's claim to CCRB that Healy "tackled me down like a football player" were true rather than an embellishment, one suspects that her injuries would have been worse.²

Approximately three-and-a-half hours after the initial entry into Apartment [REDACTED], Respondents returned to the apartment along with two Detectives. Person C was home at the time. In his CCRB interview, he claimed that the officers pushed their way into the apartment and searched inside without consent. (CCRB Ex. 3A, pp. 36-38) At some point, one of the officers declared that he had found the shield, and Person C was placed under arrest for possessing stolen property. Person A was taken into custody outside the building and charged as well. Person B, too, was arrested in connection with the stolen shield a few days later.

¹ In urging this tribunal to discredit the statement of Person A, one respondent's attorney noted that according to the transcript (CCRB Ex. 1 A, p. 24), Person A had described one of the officers as looking "like a faggot", and that the CCRB interviewer had allowed that description to stand without challenge. However, a review of the recording itself (21:26 mark) reveals that the transcript was inaccurate, and that Person A actually described the officer as looking "Italian." As such, counsel's argument is unfounded.

² [REDACTED]

Each Respondent testified and provided a version of events that was different than that provided by the civilian complainants to CCRB, both regarding their initial entry into the apartment, and when they returned again several hours later. Regarding the initial entry, Respondents all stated that they had been given consent to enter the apartment. Respondent McKenna described having a "cordial conversation" with Person A as she allowed them into the apartment; there was no yelling or screaming, no one appeared irate, and there was "no physical contact whatsoever." (Tr. 62) At no point did Respondent McKenna hear Person A complaining of any injuries. (Tr. 73-74) However, there were many details connected with this initial entry that Respondent McKenna could not recall, including the actual words exchanged with Person A. Respondent Healy, though, was more detailed and forthcoming in his testimony, and testified credibly that Person A opened the door and let them inside; there was permission granted for their entry, and he made no physical contact with Person A as they walked inside. Respondent Healy heard Respondent McKenna inform Person A that they were looking for a missing shield, and she said that the police could enter the apartment. Respondent Healy insisted that he did not push Person A. (Tr. 111, 120, 134) Like Respondent McKenna, Respondent Healy testified that Person A did not complain of being injured. (Tr. 115) Respondent Wilson testified that in response to Respondent McKenna's request to enter the apartment, Person A said that it was "okay" for the police to come in and speak with the people who had been outside during the altercation. The officers then entered with her permission, without any force being used by Respondent Healy. (Tr. 149, 170, 190)

Indeed, further support for Respondents' position that they entered with consent might be found from Person A herself; at about the 4:32 mark of her recorded statement,

Person A began to describe the door as being "wide" open, before seemingly catching herself and saying merely that the door was "open". (CCRB Ex. 1A, p. 6) Similarly, Person B described the door as "wide open." (CCRB Ex. 2A, p. 22) While a "wide open" door would not conclusively establish consent, what is telling here is Person A's apparent attempt, mid-sentence, to avoid acknowledging that the door was wide open. Person A even acknowledged that she would have let the officers in "no problem" if they had told her what they were looking for. (CCRB Ex. 1A, p. 27)

Respondents testified that they also had consent to enter the apartment when they returned a second time. Respondents brought along two detectives for the return visit, along with several additional officers, and the detectives took the lead in knocking on the door and speaking with Person C who answered it. Respondents McKenna and Healy testified credibly that they saw or heard no opposition to their entry, and followed the detectives inside the apartment believing there was consent; no one raised their voices, and the conversation seemed calm and cordial. (Tr. 64-65, 100, 133-134) Respondent Wilson specifically heard Person C tell the detectives that they could enter and look around for "whatever you looking for." (Tr. 156-157) Once inside, Respondent Wilson recovered his shield from an open shelf inside a bedroom where it was in plain view, partially sticking out from a pair of folded jeans. (Tr. 158-160, 188)

One questionable area of police testimony involved Respondent Wilson's claim that while he was inside the apartment the first time, he recognized Person B as the person who he believed must have taken his shield, he exchanged words with Person B about that theft, but then took no further police action and did not even alert his fellow officers. Respondent Wilson explained that he was "kind of like devastated by the whole incident"

and “ashamed” about having his shield removed, and wasn’t sure how to react in that situation. (Tr. 150-152) On its face, it seems rather odd that an officer would respond so indecisively under those circumstances. However, after observing Respondent Wilson’s uneasiness in relating this incident on the witness stand, this tribunal can envision Respondent Wilson’s having acted in the manner he described, and credits his testimony. CCRB suggested that the shield may actually have been recovered elsewhere, and that Respondents were merely being vindictive in returning to the apartment a second time. However, it is extremely unlikely that Respondents would get detectives and multiple additional officers involved for their return visit if that visit had no legitimate purpose, and this tribunal rejects any argument to the contrary.

On balance, the testimony of Respondents was more credible than the hearsay statements of the civilians, who have a pending federal lawsuit against the Police Department and chose not to appear at this trial. Furthermore, the civilian statements were at times inconsistent and exaggerated, whereas Respondents were essentially consistent in their accounts, and their description of events was plausible. It is well settled that the police need not procure a warrant in order to conduct a lawful search when they have obtained voluntary consent. See *People v. Adams*, 53 NY2d 1 (1981). This tribunal credits the testimony of Respondents that on the first occasion, they had consent to enter the apartment and did so without the use of physical force, and that on the second occasion, they had consent to enter and search the apartment. The record has not established, by a preponderance of the credible evidence, that there was misconduct in this matter. Accordingly, I find Respondent McKenna not guilty of both of the specifications charging him with unlawful entry, Respondent Healy not guilty of using

POLICE OFFICER BRETT HEALY
SERGEANT JAMES WILSON
LIEUTENANT PAUL MCKENNA

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force without police necessity, and Respondent Wilson not guilty of conducting an unlawful search.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED

MAY 27 2009

WILLIAM J. BRATTON
POLICE COMMISSIONER